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No. _____

In The
Supreme Court of the United States
October Term, 1986

AZL ENGINEERING, INC.
(formerly SERGENT HAUSKINS & BECKWITH),
Petitioner,

and

v.

ALLENDALE MUTUAL INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER THE LACK OF A "CASE OR CONTROVERSY" UNDER ARTICLE III, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES PRECLUDES THE EXERCISE OF FEDERAL JURISDICTION OVER THE PURPORTED DECLARATORY JUDGMENT ACTION FILED IN THIS CAUSE.

2. WHETHER THE LACK OF AN "ACTUAL CONTROVERSY" UNDER THE FEDERAL DECLARATORY JUDGMENT ACT, 28 U.S.C. SECTION 2201, PRECLUDES THE EXERCISE OF FEDERAL JURISDICTION OVER THE PURPORTED DECLARATORY JUDGMENT ACTION FILED IN THIS CAUSE.

3. WHETHER THE LACK OF A "REAL PARTY IN INTEREST" UNDER FEDERAL RULE OF CIVIL PROCEDURE 17(A) PRECLUDES THE EXERCISE OF FEDERAL JURISDICTION OVER THE PURPORTED DECLARATORY JUDGMENT ACTION FILED IN THIS CAUSE.

LIST OF PARTIES

1. AZL Engineering, Inc. (formerly Sergent Hauskins & Beckwith) is the petitioner herein. Sergent Hauskins & Beckwith was a defendant in the United States District Court for the District of New Mexico and was an appellee in the United States Court of Appeals for the Tenth Circuit.

2. Kaiser Engineers, Division of Henry J. Kaiser Company (Kaiser), was a defendant in the United States District Court for the District of New Mexico and was an appellee in the United States Court of Appeals for the Tenth Circuit. SHB is advised that Kaiser will be filing its own separate Petition For Writ Of Certiorari in this Court.

3. Allendale Mutual Insurance Company (Allendale) is the respondent herein and was a plaintiff in the United States District Court for the District of New Mexico and was an appellant in the United States Court of Appeals for the Tenth Circuit.

4. Appalachian Insurance Company was a plaintiff in the United States District Court for the District of New Mexico and was initially an appellant in the United States Court of Appeals for the Tenth Circuit. Appalachian was dismissed during the pendency of the appeal.

5. In compliance with Supreme Court Rule 28.1, the Court is advised that Sergent Hauskins & Beckwith changed its name to AZL Engineering, Inc. on September 14, 1980. AZL Engineering, Inc. is a subsidiary of AZL Resources, Inc. which, in turn, is a subsidiary of Tosco Corporation. All subsidiaries of Tosco Corporation and AZL Resources, Inc. are wholly owned. For continuity purposes, all further references in this Petition will be to Sergent Hauskins & Beckwith (SHB).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Sergent Hauskins & Beckwith, the petitioner herein, prays that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Tenth Circuit issued in this suit on November 6, 1986.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit filed November 6, 1986 (Appendix "A") is reported as *Allendale Mut. Ins. Co. v. Kaiser Engineers,* 804 F.2d 592 (10 Cir. 1986). The Memorandum Opinion and Order of the United States District Court for the District of New Mexico (Appendix "B") was filed November 21, 1983 and was not reported.

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JURISDICTION

The Opinion of the United States Court of Appeals for the Tenth Circuit was filed on November 6, 1986. (Appendix "A") A timely petition for rehearing was denied on January 2, 1987. (Appendix "C") See, Supreme Court Rule 20.4. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2101.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2 of the Constitution of the United States states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. 28 U.S.C. Section 2201 states:

In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

3. Federal Rule of Civil Procedure 17(a) states:

(a) REAL PARTY IN INTEREST. Every action shall be prosecuted in the name of the real party in interest. * * *

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STATEMENT OF THE CASE

On July 16, 1979, a uranium tailings dam at the Churchrock, New Mexico uranium mining facility of United Nuclear Corporation (UNC) failed. This resulted in substantial damages to UNC. At the time of the dam failure, UNC was insured by Allendale Mutual Insurance Company (Allendale) and Appalachian Insurance Company (Appalachian). Allendale and Appalachian refused to pay UNC under their contracts of insurance for certain damages resulting from the failure of the dam. UNC sued Allendale and Appalachian for compensatory and punitive damages in New Mexico state court.

On May 27, 1983, the state District Court entered judgment in favor of UNC and against Allendale for $24,670,724.00 in compensatory damages and $25,000,000.00 in punitive damages. Judgment was in favor of Appalachian. Allendale appealed the judgment in favor of UNC. UNC appealed the judgment in favor of Appalachian. Appalachian was subsequently dismissed from the appeal. The Supreme Court of New Mexico issued its Opinion on October 15, 1985 while this appeal was pending in the Tenth Circuit. *United Nuclear Corp. v. Allendale Mut. Ins.*, 103 N.M. 480, 709 P.2d 649 (1985). In essence, the Supreme Court of New Mexico: (1) affirmed the award of compensatory damages; (2) reversed the award of punitive damages.

On July 15, 1983, Allendale and Appalachian filed a "Complaint" (Appendix "D") against Kaiser and SHB in federal District Court. The jurisdictional basis was diversity. 28 U.S.C. Section 1332. Allendale and Appalachian sought a Declaratory Judgment. They alleged that Kaiser "engineered and designed" the tailings dam and that SHB "provided . . . engineering services for the maintenance and surveillance of" the tailings dam.

In pertinent part, the "Complaint" (Appendix "D") alleged:

* * *

3. Allendale and Appalachian had issued certain policies of insurance to UNC and UNC has made a claim against Allendale and Appalachian alleging that either or both of the said insurers are liable to UNC for indemnification under the said insurance contracts for the loss and damage suffered by UNC as the result of the said failure of the said tailings dam. Allendale and Appalachian deny liability to UNC for the said losses under the said contract of insurance.

4. United Nuclear Corporation ("UNC") has made a claim against Allendale and Appalachian alleging that either or both of the said insurers are liable to UNC for indemnification under certain insurance contracts for the loss and damage suffered by UNC as the result of the failure of a certain tailings dam at its Churchrock, New Mexico facility which failure occurred on July 16, 1979. Allendale and Appalachian deny liability to UNC for the said losses under the said contracts of insurance.

5. The lawsuit arising out of UNC's claim against Allendale and Appalachian came on for trial in the District Court of the County of Santa Fe, State of New Mexico, and on May 20, 1983 the Court therein issued certain findings of fact, conclusions of law and order for judgment and on May 27, 1983 certain judgments were entered. Post-trial motions relating to the said judgments were denied. *There is presently no way of knowing or determining whether Allendale, Appalachian or either of them will ultimately be obligated to pay to UNC all or any part of UNC's losses arising out of the failure of its dam.*

6. *Defendants herein . . . are individuals and parties who on information and belief may be liable to UNC* in contract or tort for the damages suffered by UNC as a result of the failure of the said dam. *In the event Allendale or Appalachian are obligated to pay any monies to UNC arising under their said contracts of insurance they will become subrogated by contract*

and by operation of law to any claims UNC might have against defendants. If the parties hereto await the ultimate determinations of the New Mexico courts on the question of the liability of Allendale and Appalachian under their said insurance contracts, the statutes of limitation will or may have run barring plaintiffs' *potential subrogated claims.*

7. Accordingly, and to avoid the bar, plaintiffs herein allege on information and belief that defendants and each of them were negligent in the design and construction of the dam and acted in breach or their contractual and professional obligations in the maintenance and surveillance of the dam which negligence and breach of contract caused the losses complained of by UNC against plaintiffs herein and that the said defendants are liable to UNC for UNC's said loss. (Emphasis added)

* * *

For relief, Allendale and Appalachian sought a declaratory judgment as follows:

* * *

a. If and to the extent Allendale or Appalachian are found to be liable to UNC under their contracts of insurance for loss and damage arising out of the failure of the dam on July 16, 1979, Allendale and Appalachian will be subrogated to UNC's claims against defendants herein and will be entitled to judgment against defendants herein for the amount adjudged to be their contractual liabilities (if any) to UNC.

b. That defendants, and each of them, were negligent in the design and construction of the dam and acted in breach of their contractual and professional obligations in the maintenance and surveillance of the dam which negligence and breach of contract caused the losses complained of by UNC against plaintiffs herein and that the said defendants are liable to UNC for UNC's said loss.

c. If and to the extent Allendale or Appalachian are found to be liable to UNC under their contracts of insurance for loss and damage arising out of the

> failure of the dam on July 16, 1979, that Allendale and Appalachian will be subrogated to UNC's claims against defendants herein and will be entitled to judgment against defendants herein for the amount adjudged to be their contractual liabilities (if any) to UNC.
>
> * * *

The District Court dismissed the suit without prejudice for lack of subject matter jurisdiction on November 21, 1983. (Appendix "B") The District Court stated:

> The merits of a declaratory claim can only be determined if subject matter jurisdiction exists. *Amalgamated Sugar Co. v. Bergland,* 664 F.2d 818 (10th Cir. 1981). When there is no actual controversy, there is no subject matter jurisdiction does not exist. [sic] *Norvell v. Sangre de Cristo Dev. Co., Inc.,* 519 F.2d 370 (10th Cir. 1975).
>
> The plaintiffs may have rights to assert against the defendants at some future date, however, there is no actual controversy at this time. The plaintiffs have made no payments to UNC and are denying any obligation to do so. An insurance company acquires no interest in the claim of an insured until it makes payment under the contract of insurance. *See, J.P. (Bum) Gibbins, Inc. v. Utah Home Fire Ins. Co.,* 202 F.2d 469 (10th Cir. 1953), *Rhodes v. Lucero,* 79 N.M. 403, 444 P.2d 588 (1968). The mere anticipation that the insurer will become a subrogee in the future is insufficient. *Meredith v. the Ionian Trade*[*r*], 279 F.2d 471 (2d Cir. 1960).
>
> Plaintiffs are not subrogees of UNC and they have no rights to assert against the defendants. Therefore, no actual controversy exists at this time and this court lacks subject matter jurisdiction. * * *

The Tenth Circuit reversed the District Court. (Appendix "A") It concluded that an "actual controversy" existed. SHB disagrees.

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REASONS FOR GRANTING THE PETITION

INTRODUCTION

In the context of a suit in which extraordinary exposure is present, i.e., nearly $25,000,000.00, fundamental questions of the extent of the federal judicial power are presented. Directly at issue is the "case or controversy" requirement of Art. III, Section 2 of the Constitution of the United States. Since the "case or controversy" language of Article III, Section 2 is coextensive with the "actual controversy" language of the Declaratory Judgment Act, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937); *Public Service Commission Of Utah v. Wycoff Co.*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952), this case necessarily involves the application of both terms.

As this Court has noted in the declaratory judgment context:

> . . . it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. * * *
> *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 570, 85 L.Ed. 826 (1940).

Chief Justice (then Justice) Rehnquist observed in concurrence in *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974):

> * * * . . . , as our cases abundantly illustrate, this area of law is in constant litigation, and it is an area through which our decisions have traced a path that may accurately be described as sinuous. * * *
> 415 U.S. at p. 479.

Thus, it is only through periodic examination of suits as they arise through the federal system that guidance may be provided to the lower federal courts as to what actually is a "case or controversy"/"actual controversy" in the declaratory judgment context. Moreover, it is absolute that a

federal action may only be brought by the "real party in interest." F.R.C.P. 17(a). This, in itself, is an aspect of the "case or controversy" requirement as there can be no "case or controversy" when suit is by someone other than a "real party in interest."

The issues in this case are technically framed in terms of "case or controversy," "actual controversy" and/or "real party in interest." At a more practical level is the question of whether the Declaratory Judgment Act can be manipulated, as a tactical matter, by a party with no substantive legal rights to bring suit against those with whom it has no substantive legal connection. SHB submits that through faulty analysis of the principles applicable to determining the existence or non-existence of a viable action in federal court, the Tenth Circuit has erred and has permitted this suit to proceed in violation of Article III, Section 2 of the Constitution of the United States as well as the "actual controversy" requirement of the Declaratory Judgment Act and the "real party in interest" requirement of F.R.C.P. 17(a).

POINT I: The Tenth Circuit Decision Is Contrary To Existing Decisions Of This Court As To The Meaning Of The "Case Or Controversy" Language Of Article III, Section 2 Of The Constitution Of The United States And As To The Meaning Of The "Actual Controversy" Language Of The Declaratory Judgment Act.

Valley Forge Christian College v. Americans United, Etc., 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), stated:

> * * * The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. * * *
> 454 U.S. at p. 471.

In discussing what constitutes an "actual controversy," *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, supra, observed:

> * * * Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. * * *
>
> 312 U.S. at p. 273.

See also, *Public Service Commission Of Utah v. Wycoff Co.*, supra.

Under *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, supra, the starting point of inquiry is "the facts alleged." What, then, did Allendale allege in its "Complaint"? (Appendix "D")

As to itself, Allendale alleged that: (1) it issued an insurance policy to UNC; (2) UNC made a claim against it under the insurance policy as a result of the dam failure; (3) it denied liability to UNC under the insurance policy; (4) UNC sued it in New Mexico State District Court; (5) after trial on the merits, the State District Court entered judgment against it; (6) "[t]here is presently no way of knowing or determining whether Allendale . . . will ultimately be obligated to pay to UNC all or any part of UNC's losses arising out of the failure of its dam" (Appendix "D", 15, pgh.5); (7) "[i]n the event Allendale . . . [is] obligated to pay any monies to UNC arising under [the insurance policy] [it] will become subrogated by contract and by operation of law to any claims UNC might have against defendants" (Appendix "D", 15, pgh.6); (8) "[i]f the parties hereto await the ultimate determinations of the New Mexico courts on the question of the liability of Allendale . . . under [the insurance policy], the statutes of limitation will or may have run barring [Al-

lendale's] potential subrogated claims." (Appendix "D", 15, pgh.6) Of particular significance are Allendale's concessions that it has not yet paid UNC; that it denies any obligation to pay UNC; that "in the event" it is obligated to pay UNC, it "will become subrogated"; and that its subrogation rights are "potential."

Thus, by the terms of its own "Complaint," Allendale concedes that it is not in possession of any subrogated rights; that such rights are only "potential". It is also clear from the "Complaint" that the motivating source for filing suit was fear . . . the fear of the possible running of some statute or statutes of limitation. In essence, then, Allendale filed suit in an attempt to manipulate the declaratory judgment procedure to protect alleged rights which it did not yet have. The District Court saw through this transparency and dismissed the suit.

The next question under *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, supra, is "the circumstances". Presumably, this means "the circumstances" other than those alleged in the "Complaint." In that regard, the District Court observed that Allendale "[has] made no payments to UNC and [is] denying any obligation to do so" (Appendix "B", 9-10) and that the State Court action "is presently on appeal to the New Mexico Supreme Court." (Appendix "B", 9) *United Nuclear Corp. v. Allendale Mut. Ins.*, supra.

Based upon the aforesaid "facts" and "circumstances," the question is whether they "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, supra, 312 U.S. at p. 273. What declaratory relief is sought?

Allendale sought declarations that: (1) if it ever got subrogation rights, it would, in fact, have subrogation rights; (2) SHB and Kaiser were liable to UNC; (3) if it ever got subrogation rights, Allendale, as subrogee of UNC, would be entitled to judgment against SHB and Kaiser. The District Court saw through this house of cards and dismissed the suit. Noteworthy are the absence of any allegations that UNC ever made any claim or demand against SHB or Kaiser or that Allendale itself ever made any claim or demand against SHB or Kaiser. Compare, *Aetna Life Ins. Co. v. Haworth*, supra, wherein "[p]rior to this suit, the parties had taken adverse positions with respect to their existing obligations." 300 U.S. at p. 242. Cf., *Moore v. Charlotte-Mecklenburg Board Of Education*, 402 U.S. 47, 91 S.Ct. 1292, 28 L.Ed.2d 590 (1971). See also, *Mraz v. American Universal Ins. Co.*, 616 F.Supp. 1173 (D.Md. 1985).

Based upon the aforesaid "facts" and "circumstances" the District Court agreed with SHB (and Kaiser) that there was no "actual controversy." The Tenth Circuit disagreed and reversed the District Court. The essence of the Tenth Circuit's position is contained in the following paragraph:

> The contingent nature of the right or obligation in controversy will not bar a litigant from seeking declaratory relief when the circumstances present a need for a present adjudication. * * *
>
> 804 F.2d at p. 594 (Appendix "A", 4)

SHB submits that the Tenth Circuit's Opinion is a naked violation of Article III, Section 2 and, therefore, the "actual controversy" language of 28 U.S.C. Section 2201. SHB further submits that the Tenth Circuit's Opinion is in direct and irreconcilable conflict with prior decisions of this Court. In this section of the Petition, SHB will first

address the "contingent right" argument. SHB will then discuss advisory opinions. Lastly, SHB will address the concept of "immediacy" as discussed by the Tenth Circuit in *Allendale*.

1. In *In Re Summers*, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945), this Court stated:

> A case arises, within the meaning of the Constitution, when any question respecting the Constitution, treaties or laws of the United States has assumed 'such a form that the judicial power is capable of acting on it.' *Osborn v. Bank*, 9 Wheat. 738, 819, 6 L.Ed. 204. * * * *A declaration on rights as they stand must be sought, not on rights which may arise in the future, Prentis v. Atlantic Const. Line Co.*, 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150, and there must be an actual controversy over an issue, not a desire for an abstract declaration of the law. (citations omitted). * * *
>
> 325 U.S. at pp. 566-67. (emphasis added)

Thus, under Art. III, Section 2, there is no "case or controversy" when the suit involves "rights which may arise in the future." A "case or controversy" requires "rights as they stand." By the terms of Allendale's "Complaint," Allendale owns no present rights. In *Public Service Commission Of Utah v. Wycoff Co.*, supra, speaking in the context of "the propriety of declaratory relief," 344 U.S. at p. 243, this Court stated:

> * * * While the courts should not be reluctant or niggardly in granting this relief in the cases for which it was designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, ... * * * Such differences of opinion or conflicts of interest must be 'ripe for determination' as controversies over legal rights. *The disagreement must not be nebulous or contingent* but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what

> effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them. 344 U.S. at pp. 243-44. (emphasis added)

Thus, under *In Re Summers,* supra, a matter which involves a right, the very existence of which is contingent, is not an Article III, Section 2 "case or controversy." Under *Public Service Commission Of Utah v. Wycoff Co.,* supra, a matter which is contingent is not an "actual controversy" under the Declaratory Judgment Act. Similarly, *Aetna Life Ins. Co. v. Haworth,* supra, spoke of "an adjudication of present right" in distinguishing the situation therein present from one calling only for an advisory opinion. 300 U.S. at p. 242. Plainly, Allendale had no "present right." Allendale's suit does not deal with a present right the exercise of which is subject to contingencies but with a presently non-existing right, the very existence of which depends upon contingencies. See also, *International Longshoreman's And Ware. U. v. Boyd,* 347 U.S. 222, 74 S.Ct. 447, 98 L.Ed. 650 (1954), wherein this Court wrote that where a contingency existed, there was "not a lawsuit to enforce a right," 347 U.S. at p. 224, and that no "case or controversy" existed; *Eccles v. Peoples Bank of Lakewood Village, Cal.,* 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed. 784 (1948); *Alabama State Federation Of Labor v. McAdory,* 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945).

It has often been said that one cannot be just a little bit pregnant. One either is or one is not. By analogy, one who is pregnant is a "case or controversy." One who is trying to become pregnant is not. Allendale is not even trying; it does not want to pay UNC. Allendale does not have a "case or controversy."

2. This Court has long held that Art. III, Section 2 precludes federal courts from giving advisory opinions.

See, e.g., *Hayburn's Case*, 2 Dall. 409, 1 L.Ed. 436 (1792); *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911). This Court has also long held that advisory opinions cannot be given in declaratory judgment cases. *Electric Bond & Share Co. v. Securities And Exch. Com'n*, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936 (1938) [and cases cited therein]; *Coffman v. Breeze Corporations*, 323 U.S. 316, 65 S.Ct. 298, 89 L.Ed. 264 (1945); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936). The declaratory judgment procedure cannot be used as a ruse to hoodwink a federal court into providing an advisory opinion.

What Allendale wants is a declaration that it will be the winner of a lawsuit against SHB and Kaiser if it should ever obtain any substantive rights against SHB and Kaiser. Allendale seeks to obtain a loaded and cocked gun to hold to SHB's and Kaiser's heads. The problem is that Allendale does not own the gun. It is UNC's gun.

Allendale wants a declaration that it can use should it ever obtain substantive rights. Such is an advisory opinion. *Public Service Commission Of Utah v. Wycoff Co.*, supra, observed that an attempt to use the declaratory judgment procedure to obtain a declaration "to hold in readiness for use" in the future "exceeds any permissible discretionary use of the Federal Declaratory Judgment Act." 344 U.S. at p. 245. Cf. *Green v. Mansour*, — U.S. —, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985); *Altimus v Manhood Foundation, Inc.*, 425 F.Supp. 1118 (S.D.N.Y. 1976), aff'd w/o opinion 559 F.2d 1202 [not a function of the Declaratory Judgment Act to provide a predicate to vindication of claim for damages].

Under *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, supra, the requirements for an "actual controversy" under the Declaratory Judgment Act are: (1) a substan-

tial controversy; (2) between parties having adverse legal interests; (3) of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Cross v. Occidental Fire And Casualty Company,* 347 F.Supp. 342 (W.D.Okla. 1972), identified these as the "three essential elements" of a declaratory judgment. 347 F.Supp. at p. 343. In the absence of any one of these factors, the suit must, of necessity, be a request for an advisory opinion.

In the instant suit, what is the "substantial controversy"? There is no allegation that either SHB or Kaiser was requested by either UNC or Allendale to accept all or a part of the alleged liability. Indeed, in the absence of such an allegation, it is even more clear that Allendale's suit was simply a ruse in support of its perceived need to do something about the ominous approach of the statute of limitations. There is only Allendale's "information and belief" that the "[d]efendants herein . . . may be liable to UNC . . . as a result of the failure of the said dam." (Appendix "D", 15. pgh.6). Likewise, there is no allegation that there is any dispute about Allendale's potential subrogation rights. Allendale essentially requested the District Court to declare that when it got rights, it would have rights. Merely stating the request evidences its absurdity. What, then, is the controversy? SHB surely does not know nor did the District Court. Allendale's "Complaint" simply makes a number of allegations and asks for certain declaratory relief but never identifies what, if anything, is actually in controversy.

Further, what are the adverse *legal* interests? In the explicit language of the "Complaint" itself, Allendale concedes that it does not yet possess subrogation rights; that its subrogation rights are only "potential." SHB does not disagree. The District Court concluded that Allendale had "no rights to assert against the defendants." (Appendix

"B", 10) As to New Mexico subrogation law, see, e.g. *State Farm Mut. Auto. Ins. Co. v. Foundation R. Ins. Co.*, 78 N.M. 359, 431 P.2d 737 (1967) [remedy of subrogation is for benefit of one secondarily liable who has paid debt of another]; *Rhodes v. Lucero,* supra. As will be discussed in more detail infra, in the federal system "[e]very action shall be prosecuted in the name of the real party in interest." F.R.C.P. 17(a). *United States v. Aetna Casualty & Sur. Co.,* 338 U.S. 366, 70 S.Ct. 207, 94 L.Ed. 171, 12 A.L.R. 2d 444 (1949), held that an insurer that has paid the insured and, therefore, become subrogated, is the "real party in interest" under F.R.C.P. 17(a).

Clearly, an insurer that has not paid the insured and, therefore, has not yet obtained subrogation rights is not a "real party in interest" and has no substantive rights against the tortfeasor. See, *See v. Emhart Corp.,* 444 F.Supp. 71 (W.D.Mo. 1977). Allendale concedes that its rights are only "potential." Therefore, Allendale is not a "real party in interest." As one who is not a "real party in interest", Allendale as a matter of law, cannot have "adverse legal interests" to SHB or Kaiser.

In light of the fact that no "actual controversy" is either plead or identified and/or in light of the fact that Allendale can have no adverse legal interests as a matter of law, it logically follows that there can be neither "immediacy" nor "reality" associated with Allendale's attempted invocation of the declaratory judgment procedure. The Tenth Circuit in *Allendale* never directly addressed the "substantial controversy" or "adverse legal interests" aspects of this suit. It seems to have assumed that those aspects of the suit were satisfied and largely spent its energies discussing the "immediacy" aspect of this suit. SHB obviously feels that neither the "substantial controversy" nor the "adverse legal interests" aspects of the

test were satisfied. With all due respect to the Tenth Circuit, SHB also feels that its "immediacy" position is so clearly and obviously wrong and so analytically incorrect and misleading that it simply cannot be allowed to stand as a source of potential precedent to other federal courts. SHB will now discuss "immediacy."

3. *Allendale* states:

> The contingent nature of the right or obligation in controversy will not bar a litigant from seeking declaratory relief when the circumstances reveal a need for a present adjudication. * * *
>
> * * * The running of a statute of limitations may also create a need for an adjudication of contingent rights and duties. * * *
>
> 804 F.2d at p. 594. (Appendix "A", 4, 5)

The clear motivating factor for the Tenth Circuit's finding of an "actual controversy" was Allendale's perceived fear of the imminent running of a statute of limitations. The imminent running of a statute of limitations simply cannot create a "case or controversy" or an "actual controversy."

The "Complaint" sounds in tort (negligence) and in breach of contract. To bring any type of legal action, one must have substantive rights to assert. The basic negligence action requires: (1) duty; (2) breach of duty; (3) damages; (4) causation. Prosser, *Law Of Torts*, 4th Ed. (1971), Section 30, p. 143. The basic breach of contract action requires: (1) a contract; (2) a breach of contract; (3) damages; (4) causation. *McCasland v. Prather*, 92 N.M. 192, 585 P.2d 336 (Ct.App. 1978). The existence of these essential elements creates the action, i.e., the ability to walk into a courthouse with filing fee in hand and start a lawsuit. The statute of limitations plays no role in the

existence or nonexistence of these essential elements. If the one being sued raises the statute of limitations as an affirmative defense and it proves to be a legitimate defense, then the suit will be dismissed. See, e.g., *Irvine v. St. Joseph Hosp., Inc.*, 102 N.M. 572, 698 P.2d 442 (Ct.App. 1984), cert. quashed 102 N.M. 564, 698 P.2d 434. On the other hand, a legitimate statute of limitations defense can be waived. See, e.g., *Apodaca v. Unknown Heirs Of Following Persons*, 98 N.M. 620, 651 P.2d 1264 (1982). It is often said that, generally speaking, statutes of limitation are restrictions on the remedy but not the right. See, e.g., *Davis v. Savage*, 50 N.M. 30, 168 P.2d 851 (1946); *Britton v. Britton*, 100 N.M. 424, 671 P.2d 1135 (1983). Stated another way, the right defines itself separate and apart from the existence of a statute of limitations and the right continues to exist even after the statute of limitations has passed. Thus, the existence of a "case or controversy" cannot be defined by reference to a statute of limitations.

Further, the "immediacy" allegedly created by the statute of limitations (See, Section 37-1-4, N.M.S.A. 1978) is not one which jumped out from behind a tree in the forest and surprised Allendale. The statute of limitations started to run when the dam broke and UNC began to sustain damages on July 16, 1979. What could Allendale have done to protect itself from the rather lumbering approach of the statute of limitations? It, of course, could have paid UNC.[1] Another approach, as acknowledged by the Tenth Circuit, was that of:

> . . . impleading the defendants in the state court action. *See*, N.M.R. Civ. P. 14(a) (1978) (permitting defendant to serve third-party complaint 'upon a person

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1 We do not know today if it has yet paid UNC.

> not a party to the action who is or *may be* liable to him for all or part of the plaintiff's claim against him') (emphasis added). * * *
>
> 804 F.2d at p. 595, n. 2. (Appendix "A", 7)

A third option was to have the insured, UNC, sue SHB and Kaiser within the statute of limitations and then for Allendale to substitute itself as plaintiff under F.R.C.P. 25 (c) which provides for substitution of parties upon transfers of interest.

Thus, the "immediacy" allegedly created by the statute of limitations is a false issue. It was not created by the statute of limitations. It was created by Allendale's failure to take steps available to it to prevent the statute of limitations from becoming a concern.

It may be seen, therefore, that whether one attacks this suit from the "contingent right" perspective or the "advisory opinion" perspective or the "immediacy" perspective apparently favored by the Tenth Circuit, the *Allendale* opinion is in direct and irreconcilable conflict with prior decisions of this Court. There is simply no controversy, much less a substantial one, between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, supra. This becomes even more obvious when one views the *Allendale* suit from the perspective of F.R.C.P. 17(a)'s "real party in interest" rule as will be done in the next section of this Petition.

POINT II: The Tenth Circuit Decision Is Contrary To Existing Decisions Of This Court As To Who Is A "Real Party In Interest" Under Federal Rule Of Civil Procedure 17(a)

Perhaps the single most useful analytical tool in resolving the "case or controversy"/"actual controversy" question in this suit is F.R.C.P. 17(a) which states:

> (a) REAL PARTY IN INTEREST. Every action shall be prosecuted in the name of the real party in interest. * * *

This simple, unadorned yet explicit directive provides an easy answer to the "case or controversy"/"actual controversy" question. SHB submits that *Allendale* is in direct and irreconcilable contravention of a controlling decision of this Court as well as a decision of the Tenth Circuit left uncited in *Allendale*.

As noted in Wright, *Law of Federal Courts* (1976), Section 70 (hereinafter, *Wright*):

> * * * Under the rule the 'real party in interest' is the party who, by the substantive law, possesses the right sought to be enforced and not necessarily the person who will ultimately benefit from the recovery * * *
>
> *Wright*, p. 330.

See also, *McNeil Construction Company v. Livingston State Bank*, 185 F.Supp. 197 (D.Mont. 1960); *Reichhold Chemicals, Inc. v. Travelers Ins. Co.*, 544 F.Supp. 645 (E.D. Mich. 1982). *Wright* also observes:

> Since the rule does direct attention to the person with the substantive right sought to be enforced, state law must be looked to in diversity cases to see who this person is, ... * * *
>
> *Wright*, p. 331.

See also, *McNeil Construction Company v. Livingston State Bank*, **supra.**

Was Allendale a "real party in interest"? The simple, unequivocal and dispositive answer is "no". The District Court concluded:

> * * * The [plaintiff has] made no payments to UNC and [is] denying any obligation to do so. An insurance company acquires no interest in the claim of an insured until it makes payment under the contract of insurance. *See, J. P. (Bum) Gibbins, Inc. v. Utah*

Home Fire Ins. Co., 202 F.2d 469 (10th Cir. 1953), *Rhodes v. Lucero*, 79 N.M. 403, 444 P.2d 588 (1968). * * *

(Appendix "B", 9-10)

The District Court further concluded that Allendale had "no rights to assert against the defendants." (Appendix "B", 10) See also, *State Farm Mut. Auto. Ins. Co. v. Foundation R. Ins. Co.*, supra. By its own allegations, Allendale was not subrogated when it filed the "Complaint" and its subrogation rights were only "potential." Allendale was not the owner of the "substantive right sought to be enforced." By definition, "potential" means:

> 1. Something that exists in a state of potency or possibility for changing or developing into a state of actuality. * * * *Webster's Third New International Dictionary* (1976)

The "actuality" in the instant case rested with UNC. UNC possessed the "right sought to be enforced" under the substantive law. UNC, not Allendale, was the legal owner of the claim. Cf., *See v. Emhart Corp.*, supra. Damages were obviously sustained but by UNC, not Allendale. Just as obviously, UNC had not been recompensed for its damages by Allendale. That no rights had passed to Allendale would seem patently obvious from the mere fact that Allendale was being sued by UNC. Until UNC was recompensed by Allendale, UNC was not made whole and the substantive right remained in the possession of UNC.

Allendale is in direct and irreconcilable conflict with this Court's landmark case on F.R.C.P. 17(a) and the "real party in interest" rule. *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 70 S.Ct. 207, 94 L.Ed. 171, 12 A.L.R.2d 444 (1949), clearly and unequivocally stated:

> * * * Rule 17(a) of the Federal Rules . . . provides that 'Every action shall be prosecuted in the name of the real party in interest,' . . . . If the subrogee has paid an

> entire loss suffered by the insured, it is the only real party in interest and must sue in its own name. 3 Moore, Federal Practice 2d ed. p. 1339. If it has paid only part of the loss, both the insured and insurer (and other insurers, if any, who have also paid portions of the loss) have substantive rights against the tortfeasor which qualify them as real parties in interest.
>
> 338 U.S. at pp. 380-381.

Allendale is also in direct and irreconcilable conflict with the Tenth Circuit's own seminal "real party in interest" case following this Court's decision in *United States v. Aetna Cas. & Sur. Co.,* supra. In *Gas Service v. Hunt,* 183 F.2d 417 (10 Cir. 1950), the Tenth Circuit stated:

> * * * It is the rule in the United States courts that where an insurer pays the insured in full for a loss and becomes subrogated to all of the rights of the insured against the wrongdoer, the action against the wrongdoer to recover in tort must be maintained in the name of the insurer. *United States v. Aetna Casualty & Surety Co.,* 338 U.S. 366, 70 S.Ct. 207; *American Fidelity & Casualty Co. v. All American Bus Lines,* 10 Cir., 179 F.2d 7. And it is the further rule that where the owner has been reimbursed for only part of the loss and asserts a claim against the wrongdoer for the balance in excess of the amount paid, both the insured and the insurer own portions of the substantive right against the wrongdoer and should appear in the litigation in their own names. * * *
>
> 183 F.2d at p. 419.

See also, *Wright,* pp. 331-32.

Clearly, *Allendale* cannot be allowed to stand as it directly contravenes a landmark decision of this Court as well as a seminal decision of the Tenth Circuit itself.

As the District Court clearly and starkly noted: "[Allendale has] made no payments to UNC and [is] denying any obligation to do so." (Appendix "B", 9-10) This

court has long recognized, as did the District Court, that subrogation depends upon payment. See, e.g., *Aetna Life Ins. Co. v. Town Of Middleport,* 124 U.S. 534, 8 S.Ct. 625, 31 L.Ed. 537 (1888); *Liverpool & G.W. Steam Co. v. Phenix Ins. Co.,* 129 U.S. 397, 9 S.Ct. 469, 32 L.Ed. 788 (1889); *Putnam v. Commissioner Of Internal Revenue,* 352 U.S. 82, 77 S.Ct. 175, 1 L.Ed.2d 144 (1956). Allendale was not a "real party in interest." That simple fact is dispositive. The District Court was right. The Tenth Circuit is wrong.

Viewing this case from the perspective of F.R.C.P. 17(a)'s "real party in interest" rule, it is clear that the Tenth Circuit erred. It is also clear that the Tenth Circuit's *Allendale* decision is in direct and irreconcilable conflict with this Court's decision in *United States v. Aetna Cas. & Sur. Co.,* supra. On the basis of the "real party in interest" rule alone, SHB submits that reversal is mandated.

POINT III: The Tenth Circuit Decision Is In Conflict With Decisions From The Tenth Circuit Itself As Well As Decisions From Other Circuits.

The decisions of this Court are, or should be, binding upon all of the Circuits. Since *Allendale* conflicts with decisions of this Court, it must, of necessity, conflict with the law, or what should be the law, in all the other circuits. Nevertheless, SHB will briefly focus attention on cases from the Tenth Circuit and other Circuits which it believes state principles in conflict with *Allendale.* SHB will first discuss internal conflicts which *Allendale* has created within the Tenth Circuit itself. SHB will then highlight cases from other Circuits as briefly as possible.

1. *Tenth Circuit.* As discussed in Point II, *United States v. Aetna Cas. & Sur. Co.,* supra, is controlling on the question of whether Allendale was a "real party in interest." As also discussed in Point II, *Gas Service v.*

Hunt, supra, is the Tenth Circuit's "real party in interest" case immediately following *United States v. Aetna Cas. & Sur. Co.,* supra. As *Allendale* is in direct and irreconcilable conflict with *United States v. Aetna Cas. & Sur. Co.,* supra, it is also in obvious conflict with *Gas Service v. Hunt,* supra. Conspicious by their absence in the *Allendale* decision are any citations to either of these two cases. The Tenth Circuit cannot overrule this Court. *Allendale* has not only sub silentio overruled *Gas Service v. Hunt,* supra. Allendale has also sub silentio overruled *United States v. Aetna Cas. & Sur. Co.,* supra.

Further, *Allendale* directly conflicts with another Tenth Circuit opinion, *Norvell v. Sangre de Cristo Development Co., Inc.,* 519 F.2d 370 (10 Cir. 1975). Curiously, the *Allendale* decision makes no mention of *Norvell* despite its citation by the District Court. (Appendix "B", 9)

Norvell discussed various decisions of this Court in the context of the propriety of the declaratory judgment procedure in the face of contingencies. Acknowledging that "[i]t is fundamental that federal courts do not render advisory opinions," 519 F.2d at p. 375, and acknowledging that federal courts "are limited to deciding actual cases and controversies," 519 F.2d at p. 375, and acknowledging that "[w]e cannot render advisory opinions on unknown facts," 519 F.2d at p. 378, the Tenth Circuit held:

> Finally, we hold that declaratory judgments are improper when, as here, ongoing activity may radically change the factual situation.
>
> • • •
>
> 519 F.2d at p. 378

If *Norvell* is right, *Allendale* is wrong. With *Norvell* and *Allendale* on the books together, there is a glaring conflict within the Tenth Circuit itself which the Tenth

Circuit has declined to address and which can only breed confusion in future litigation within the Tenth Circuit and elsewhere. See also *Dawson v. Department Of Transp.*, 480 F.Supp. 351 (W.D.Okla. 1979).

SHB notes that *Allendale* has already been cited, curiously, in a case dismissing a declaratory judgment action in the face of contingencies. This as yet unpublished opinion is attached as Appendix "E". *United States v. Undetermined Quantities Of An Article of Drug "Biotin"*, Civ. A. No. 86-A-1823, United States District Court for the District of Colorado, "Memorandum Opinion And Order," filed January 26, 1987. Even more curiously, this case cites *Allendale* in conjunction with cases cited in this Petition which SHB feels contradict it.

2. *First Circuit. Boston Teachers Union, Local 66 v. Edgar*, 787 F.2d 12 (1 Cir. 1986) [declaratory judgment action requires a "substantial controversy over present rights." 787 F.2d at p. 15]. See also, *Indemnity Ins. Co. Of North America v. Kellas*, 173 F.2d 120 (1 Cir. 1949).

3. *Second Circuit. Bunge Corporation v. London and Overseas Insurance Co.*, 394 F.2d 496 (2 Cir. 1968), cert. den. 393 U.S. 925 [an insurer who has not paid its insured's claim has no rights in claim which the insured may have against third parties]. See also, *Meredith v. The Ionian Trader*, 279 F.2d 471 (2 Cir. 1960); *Bellefonte Reinsurance Co. v. Aetna Cas. And Sur. Co.*, 590 F.Supp. 187 (S.D.N.Y. 1984) [declaratory judgment not justiciable if it presents "a danger or dilemma which is contingent upon the happening of certain future or hypothetical events." 590 F.Supp. at p. 191]; *M & M Transp. Co. v. U.S. Industries, Inc.*, 416 F.Supp. 865 (S.D.N.Y. 1976); *Altimus v. Manhood Foundation, Inc.*, supra.

4. *Third Circuit. Aralac, Inc. v. Hat Corporation Of America*, 166 F.2d 286 (3 Cir. 1948) [declaratory judg-

ment procedure involves "the determination of an already existing right." 166 F.2d at p. 291]. See also, *Luis v. Dennis,* 751 F.2d 604 (3 Cir. 1984); *Companies Assurance Co. v. Alliance Assurance Co.,* 585 F.Supp. 1382 (D.V.I. 1984) [" . . ., federal courts are not authorized to give advisory opinions based upon a hypothetical set of facts which may never come into being." 585 F.Supp. at p. 1384]; *Kiser v. Johnson,* 404 F.Supp. 879 (M.D.Pa. 1975) ["[i]f there exist contingencies that must occur before an issue is actually joined by the parties, then the case will not be ripe until those contingencies occur." 404 F.Supp. at 886].

5. *Fifth Circuit. Tilley Lamp Company v. Thacker,* 454 F.2d 805 (5 Cir. 1972) [one who sought a determination of his right to receive indemnity should another be found liable in a future lawsuit sought a declaratory judgment "based upon a purely hypothetical state of facts, conjectural in nature, and incapable of specific relief." 454 F.2d at p. 808]. See also, *American F. & C. Co. v. Pennsylvania T. & F.M. Cas. Ins. Co.,* 280 F.2d 453 (5 Cir. 1960) [" . . . it is not the function of a United States District Court to sit in judgment on these nice and intriguing questions which today may readily be imagined, but may never in fact come to pass." 280 F.2d at p. 461].

6. *Sixth Circuit.* The Sixth Circuit appears to be a Circuit wherein the desire exists to resolve declaratory judgment dismissals on the basis of "discretion" rather than "actual controversy." As Hart & Wechsler, *The Federal Courts And The Federal System,* 140 (1953), have observed:

> * * * . . ., opinions denying relief often leave it doubtful whether the court thought a controversy was lacking or simply that declaratory relief was inappropriate.

Certainly, it is easier to dismiss upon the basis of discretion rather than reach the constitutional question. Nevertheless, within that analytical framework, the Sixth Circuit has made statements in support of SHB's position herein. See, e.g., *Manley, Bennett, McDonald v. St. Paul Fire*, 791 F.2d 460 (6 Cir. 1986) [declaratory judgment action should not be used for "procedural fencing."].

7. *Seventh Circuit. Urantia Foundation v. C.I.R.*, 684 F.2d 521 (7 Cir. 1982) ["[i]t is settled law that an actual controversy, in the context of declaratory judgment actions, must be one which exists in fact and not one which may occur in the future,. . ." 684 F.2d at p. 525]; *Stephenson v. Stephenson*, 249 F.2d 203 (7 Cir. 1957) [declaratory judgment requires "a present, specific right." 249 F.2d at p. 208].

8. *Ninth Circuit. Aetna Cas. & Sur. Co. v. PPG Industries, Inc.*, 554 F.Supp. 290 (D.Ariz. 1983) [indemnity issue; "[d]eclaratory judgment actions may not be based upon future controversies that may never arise." 554 F.Supp. at p. 296]; *Laguna Pub. Co. v. Employers Reinsurance Corp.*, 617 F.Supp. 271 (C.D.Cal. 1985) [suit involving action by third-party claimant against excess insurer of insured against whom it had obtained judgment dismissed for "lack of a justiciable case or controversy" because "the Court cannot be certain that a controversy will arise. . . ." 617 F.Supp. at p. 273].

9. *Eleventh Circuit. Frank Briscoe Co. v. Georgia Sprinkler Co.*, 713 F.2d 1500 (11 Cir. 1983) [insurer which pays entire loss suffered by insured becomes subrogated to interests of insured and is "real party in interest" under F.R.C.P 17(a)]; *Hendrix v. Poonai*, 662 F.2d 719 (11 Cir. 1981) [no "live controversy" since only "an abstract question 'based upon the possibility of a factual situation that may never develop. (citation omitted).'" 662 F.2d at

p. 722]; *Emory v. Peeler,* 756 F.2d 1547 (11 Cir. 1985); *Great Northern Paper Co. v. Babcock & Wilcox Co.,* 46 F.R.D. 67 (N.D.Ga. 1968) ["[t]he Court should not pass on questions of insurance coverage and liability for indemnification when the contingencies giving rise to them may never occur. To do so would amount to an advisory opinion which this court cannot give." 46 F.R.D. at p. 70].

10. *D.C. Circuit. Link Aviation, Inc. v. Downs,* 325 F.2d 613 (D.C. Cir. 1963) [F.R.C.P. 17(a); "when an insurer has paid the full amount of a loss suffered by the insured, the insurer becomes subrogated to the full extent of the insured's claim against the one primarily liable for the loss, and . . . in any suit to enforce the claim the insurer is the only real party in interest." 325 F.2d at p. 614].

CONCLUSION

The conflicts in the Tenth Circuit's *Allendale* decision with prior controlling decisions of this Court are clear, direct and irreconcilable. In *General Atomic Co. v. Felter,* 434 U.S. 12, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977), this court granted certiorari and summarily reversed a decision of the Supreme Court of New Mexico in a per curiam opinion without oral argument in an analogous situation. In *General Atomic Co. v. Felter,* supra, there was a direct conflict with a prior decision of this Court and the Supremacy Clause. SHB respectfully urges that the Tenth Circuit's *Allendale* decision is in direct conflict with controlling decisions of this Court and Article III, Section 2 of the Constitution. That being the case, SHB respectfully suggests a similar disposition. Indeed, such a disposition could be made on the basis of F.R.C.P. 17(a)'s "real party in interest" rule alone.

The granting of certiorari is proper for any number of reasons. The most obvious, of course, are the direct

conflicts with prior decisions of this Court which, under the particular circumstances of this case, translate into a rather bald violation of Art. III, Section 2 of the Constitution. In *Valley Forge, Etc. v. Americans United, Etc.*, supra, this Court granted certiorari "[b]ecause of the unusually broad and novel view of standing to litigate a substantive question in the federal courts adopted by the Court of Appeals, . . . " 454 U.S. at p. 470. SHB submits that the view taken by the Tenth Circuit in *Allendale* of the "case or controversy" requirement of Article III, Section 2 and the "actual controversy" requirement of 28 U.S.C. Section 2201 and, of necessity, of the "real party in interest" rule of F.R.C.P. 17(a) are "unusually broad and novel" and, therefore, require analysis by this Court.

Similarly, in *Provident Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968), this Court granted certiorari since the decision of the Court of Appeals "presented a serious challenge to the scope of the newly amended Rule 19, ..." 390 U.S. at p. 107. Not only does *Allendale* present a serious challenge to the scope of F.R.C.P. 17(a), it, in SHB's judgment, erases the rule from the books and, in the process, erases this Court's decision in *United States v. Aetna Casualty & Sur. Co.*, supra. That being the case, certiorari should be granted.

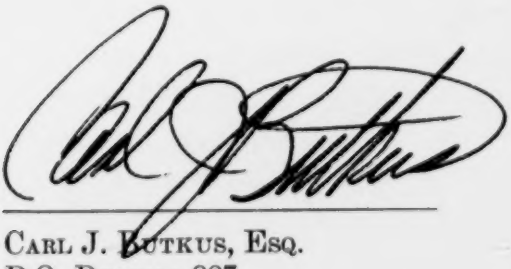
Further, there is at least one other consideration supporting a grant of certiorari. This is a concern for federalism. If *Allendale* is allowed to stand, New Mexico's state law of subrogation will be effectively overriden by the federal declaratory judgment procedure. Insurers who possess no substantive subrogation rights under state law will, nevertheless, be able to sue alleged tortfeasors for a declaratory judgment in federal court in any given instance in which they feel that their potential subrogation rights

are threatened and in which they can establish diversity jurisdiction. This effective override of state substantive law through the use of a procedural statute which, supposedly, creates no substantive rights, *Ashwander v. Tennessee Valley Authority,* supra, is an unwarranted extension of federal judicial power to the detriment of state law. It also seems to be an abusive use of diversity jurisdiction. Bluntly stated, *Allendale* is precedent which, if allowed to stand, will be used as a lever by those who possess no substantive rights to pry open the already bursting doors of federal courthouses under the guise of declaratory judgment actions.

There must be a "case or controversy." There must be an "actual controversy." There must be a "real party in interest." None exist herein.

For all of the reasons stated in this Petition, SHB prays that its Petition for Writ of Certiorari be granted. To the extent that arguments contained in Kaiser's separate Petition support reversal of *Allendale,* they are hereby adopted.

Respectfully submitted
CIVEROLO, HANSEN & WOLF, P.A.



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APPENDIX "A"

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ALLENDALE MUTUAL INSURANCE COMPANY, a Rhode Island corporation,	)	
Plaintiff-Appellant,	)	
v.	)	
	)	No. 83-2671
KAISER ENGINEERS, DIVISION OF HENRY J. KAISER COMPANY; SERGENT HAUSKINS & BECKWITH,	)	
Defendants-Appellees.	)	

(Filed Nov. 6, 1986)

Appeal from the United States District Court
for the District of New Mexico

(D.C. No. CIV-83-1134-M)

Seth D. Montgomery (Katherine A. Weeks also of Montgomery & Andrews with him on the briefs), Santa Fe, New Mexico, for Plaintiff-Appellant.

Elliot L. Bien (Vernon L. Goodin and Stephen C. Tausz also of Bronson, Bronson & McKinnon with him on the brief), San Francisco, California, for Defendant-Appellee Kaiser Engineers, Division of Henry J. Kaiser Company.

Carl J. Butkus of Civerolo, Hansen & Wolf, Albuquerque, New Mexico, for Defendant-Appellee Sergent Hauskins & Beckwith.

Before HOLLOWAY, Chief Judge, LOGAN, Circuit Judge, and BRETT, District Judge.*

LOGAN, Circuit Judge.

The only issue on appeal in this diversity case is whether an "actual controversy" exists within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201, between an insurer and alleged third party tortfeasors in the following circumstances.

The plaintiff, Allendale Mutual Insurance Company, had insured United Nuclear Corporation's uranium mill in New Mexico. An earthen dam for the mill's tailing pond, built by defendants Kaiser Engineers and Sergent Hauskins & Beckwith, failed, causing huge losses. United Nuclear sought recovery for the loss from Allendale under the policy. Allendale denied that its policy provided coverage for this type of accident. United Nuclear then sued Allendale over the coverage in New Mexico state court and was awarded more than $24 million compensatory damages. While an appeal of the award was pending in the New Mexico Supreme Court, Allendale filed this diversity action in federal district court in New Mexico against defendants, seeking a declaratory judgment that, if held liable to United Nuclear, it would be entitled

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*The Honorable Thomas R. Brett, United States District Judge for the District of Oklahoma, sitting by designation.

to judgment against defendants as subrogee of United Nuclear's claims. Allendale commenced this declaratory judgment action because it feared the four-year New Mexico statute of limitations would expire on its subrogation claim before the New Mexico Supreme Court rendered its decision on the appeal.[1]

The federal district court dismissed Allendale's action for lack of subject matter jurisdiction, ruling that the pending state court appeal prevented an actual controversy from existing between Allendale and the defendants. Allendale has appealed to this court; we now reverse and remand.

In dismissing Allendale's action, the district court stated the general rule that an insurance company acquires no subrogation interest in the claim of an insured until payment to the insured is made, citing *Meredith v. The Ionian Trader,* 279 F.2d 471, 474 (2d Cir. 1960), and *J.P. (Bum) Gibbons, Inc. v. Utah Home Fire Insurance Co.,* 202 F.2d 469, 473 (10th Cir. 1953). But in dismissing on this ground, the district court mistakenly equated the "actual controversy" requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201, with the interest required to sue for damages as subrogee. Allendale would not have needed a declaratory judgment if it had already paid United Nuclear—it then could have sued defendants under fully ripened subrogation rights. By statute a declaratory

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[1] While the present appeal was pending in this court, the New Mexico Supreme Court affirmed the $24 million compensatory damages award against Allendale but reversed a $25 million punitive damages award. *See United Nuclear Corp. v. Allendale Mutual Insurance Co.,* 103 N.M. 480, —, 709 P.2d 649, 654-57 (1985).

judgment may be obtained "whether or not further relief is or could be sought." *Id.*

At least at the moment that the insurer has suffered a legal judgment requiring it to make payment to the insured, that insurer has a sufficient interest in recovery against third parties who allegedly caused the injury to create an actual controversy within the meaning of the Declaratory Judgment Act. The United States Supreme Court has stated the test for an actual controversy under 28 U.S.C. § 2201 as whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 122 (1974) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941)).

The contingent nature of the right or obligation in controversy will not bar a litigant from seeking declaratory relief when the circumstances reveal a need for a present adjudication. *See e.g., Seguros Tepeyac, S.A. v. Jernigan,* 410 F.2d 718, 729 (5th Cir.) (declaratory judgment appropriate to determine insurer's duty to reimburse insured for any future payments insured might make to judgment creditor), *cert. denied,* 396 U.S. 905 (1969); *West American Insurance Co. v. Allstate Insurance Co.,* 295 F.2d 513, 516 (10th Cir. 1961) (actual controversy existed between two insurance companies as to who had primary liability for any damages their mutual insured might be required to pay). In *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270 (1941), a liability insurer brought a federal declaratory judgment

action against its insured and an injured third party who had sued the insured in state court. In the federal action, the insurer sought a judgment to the effect that it was not liable to defend or indemnify its insured. The injured third party argued that the complaint against him failed to state a cause of action because no actual controversy existed between him and the insurer. The Supreme Court held otherwise, noting that Ohio law gave the injured party "a statutory right to proceed against [the insurer] by supplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition." *Id.* at 273. Thus, an actual controversy existed between the insurer and the injured party even though the latter's claim against the insurer was contingent on (1) his obtaining a final judgment against the insured, and (2) the insured's failure to satisfy that judgment within thirty days.

The need for a declaratory adjudication of the controversy between the insurer and the injured party in *Maryland Casualty* arose from the potential for inconsistent federal and state interpretations of the insurance policy if the injured party was not joined in the federal action. *Id.* at 274. The running of a statute of limitations may also create a need for an adjudication of contingent rights and duties. In *Fidelity and Deposit Co. v. City of Sheboygan Falls,* 713 F.2d 1261 (7th Cir. 1983), a surety on a contractor's bond brought a declaratory judgment action against the contractor and the city for which the allegedly defective work had been performed. The complaint sought a declaration that (1) the surety was not liable on the bond because the contractor had not breached

its agreement with the city, or (2) if the surety was liable on the bond, then it was entitled to indemnity from the contractor. The court noted that the surety's action in seeking a declaratory judgment was apparently motivated by its concern that the passage of time would bar its right to seek indemnity for any amount it might have to pay the city. This, the court held, was "the kind of interest that the Declaratory Judgment Act was intended to protect." *Id.* at 1265.

In the instant case a state court had rendered a legal judgment binding upon Allendale. Allendale, of course, had the right to appeal in an attempt to reverse that judgment. But, unless reversed, the judgment legally binds Allendale to pay more than $24 million to United Nuclear. Therefore, the controversy between Allendale and the defendants in this case is significantly less remote or contingent than the controversy between the insurer and the injured party in *Maryland Casualty. See Spivey Co. v. Travelers Insurance Cos.*, 407 F. Supp. 916, 917-18 (E.D. Pa. 1976) (party appealing judgment may seek declaratory judgment that its insurers are liable to indemnify it, despite possibility that judgment could be set aside on appeal). Moreover, a clear need exists for the present action, to determine the defendants' liability to United Nuclear or its subrogee, Allendale. If this action were not maintainable, Allendale would be forced to choose between giving up its right to appeal the state

court award to its insured, and giving up its subrogation rights against the defendants.[2]

In *National Valve & Manufacturing Co. v. Grimshaw*, 181 F.2d 687 (10th Cir. 1950), we sustained a district court which had exercised its discretion to dismiss a contractor's claim for indemnity while appeal of the judgment against it was pending in state court. There was no indication in that case that a statute of limitations problem existed, or other circumstances revealed a need for immediate adjudication; the court's decision was upheld as not an abuse of discretion in the circumstances of the case. That lack of any need for an early determination of the right to indemnification distinguishes *National Valve* from the case before us. But to the extent that we made statements there indicating that pendency of the appeal prevented an actual controversy from existing, we disapprove of them.

We recognize, of course, that in a case such as the one before us the district court will normally abate the proceedings until the state supreme court determines the appeal. We find, however, that the district court erred in holding that it lacked subject matter jurisdiction over this action during the pendency of the appeal. We therefore reverse and remand for further proceedings consistent with this opinion.

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[2] Admittedly, Allendale could have avoided this predicament by impleading the defendants in the state court action. *See* N.M.R. Civ. P. 14(a) (1978) (permitting defendant to serve third-party complaint "upon a person not a party to the action who is *or may be* liable to him for all or part of the plaintiff's claim against him") (emphasis added). The third-party procedure is optional, however, and we see no reason to punish Allendale for choosing not to follow that course.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALLENDALE MUTUAL INSURANCE COMPANY, a Rhode Island corporation, and APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation,	)	
Plaintiffs,	)	
	)	No. 83-1134-M
v.	)	Civil
KAISER ENGINEERS, Division of HENRY J. KAISER COMPANY; SERGENT, HAUSKINS & BECKWITH,	)	
Defendants.	)	

MEMORANDUM OPINION
AND
ORDER

(Filed Nov. 21, 1983)

This matter comes on for consideration on plaintiffs' motion for an indefinite stay pending adjudication in the New Mexico Supreme Court of underlying litigation and defendants' motions to dismiss for lack of subject matter jurisdiction or alternatively for failure to state a claim. Having considered the motions and the briefs of counsel, I find plaintiffs' motion is not well taken and should be denied. I find defendants' motions to dismiss

for lack of subject matter jurisdiction are well taken and they will be granted.

Plaintiffs in this case are two insurance companies: Allendale Mutual Insurance Company (Allendale) and Appalachian Insurance Company (Appalachian). Defendants are Sergent, Hauskins and Beckwith (Sergent) and Kaiser Engineers (Kaiser).

Allendale and Appalachian issued insurance policies to a non-party, UNC. UNC made claims against Allendale and the Appalachian under those policies for damages resulting from failure of a tailings dam. Allendale and Appalachian denied coverage. The coverage question was litigated in New Mexico State Court and judgment was entered May 27, 1983. The case is presently on appeal to the New Mexico Supreme Court. The plaintiffs seek a declaratory judgment that if they are found to be liable to UNC under their contracts of insurance for damages arising out of the failure of the dam, the plaintiffs will be subrogated to UNC's claims against Sergent and Kaiser in the amount of each plaintiff's adjusted contractual liability.

The merits of a declaratory claim can only be determined if subject matter jurisdiction exists. *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818 (10th Cir. 1981). When there is no actual controversy, there is no subject matter jurisdiction does not exist. *Norvell v. Sangre de Cristo Dev. Co., Inc.*, 519 F.2d 370 (10th Cir. 1975).

The plaintiffs may have rights to assert against the defendants at some future date, however, there is no actual controversy at this time. The plaintiffs have made no payments to UNC and are denying any obligation to

do so. An insurance company acquires no interest in the claim of an insured until it makes payment under the contract of insurance. *See J. P. (Bum) Gibbins, Inc. v. Utah Home Fire Ins. Co.*, 202 F.2d 469 (10th Cir. 1953), *Rhodes v. Lucero*, 79 N.M. 403, 444 P.2d 588 (1968). The mere anticipation that the insurer will become a subrogee in the future is insufficient. *Meredith v. The Ionian Trade*, 279 F.2d 471 (2d Cir. 1960)

Plaintiffs are not subrogees of UNC and they have no rights to assert against the defendants. Therefore, no actual controversy exists at this time and this court lacks subject matter jurisdiction. There is no authority for staying this case in the absence of jurisdiction. Now, Therefore,

IT IS ORDERED that plaintiffs' motion for an indefinite stay shall be, and hereby is, denied.

IT IS FURTHER ORDERED that defendants' motions to dismiss without prejudice for lack of subject matter jurisdiction shall be, and hereby are, granted.

/s/ E. L. Mechem
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX "C"

NOVEMBER TERM—January 2, 1987

Before The Honorable William J. Holloway, and The Honorable James K. Logan, Circuit Judges, and The Honorable Thomas R. Brett*

ALLENDALE MUTUAL INSURANCE COMPANY, a Rhode Island corporation,	)	
Plaintiff-Appellant,	)	
vs.	)	
	)	No. 83-2671
KAISER ENGINEERS, DIVISION OF HENRY J. KAISER COMPANY, and SERGENT HAUSKINS & BECKWITH,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of the petition for rehearing filed by the appellee Kaiser Engineers, and the petition for rehearing with suggestion for rehearing en banc filed by the appellees [Sergent] Hauskins and Beckwith.

Upon consideration whereof, the petitions for rehearing are denied by the panel to whom the case was argued and submitted.

The petitions for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active ser-

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*of the United States District Court for the Northern District of Oklahoma, sitting by designation.

vice on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALLENDALE MUTUAL
INSURANCE COMPANY,
a Rhode Island corporation, and
APPALACHIAN INSURANCE
COMPANY, a Rhode
Island corporation,

Plaintiffs,

No. CIV 83 1134 M

vs.

KAISER ENGINEERS,
DIVISION OF HENRY J.
KAISER COMPANY;
SERGENT HAUSKINS &
BECKWITH; and DOES 1-10,

Defendants.

COMPLAINT

(Filed July 15, 1983)

Come now Allendale Mutual Insurance Company and Appalachian Insurance Company and for their cause of action and claim for relief against Kaiser Engineers, Division of Henry J. Kaiser Company and Sergent Hauskins & Beckwith state and allege as follows:

1. Allendale Mutual Insurance Company (hereinafter "Allendale") is a mutual insurance company organized and existing under the laws of the State of Rhode Island, with its principal place of business in the State of Rhode Island. Appalachian Insurance Company (here-

inafter "Appalachian") is a corporation organized and existing under the laws of the State of Rhode Island, with its principal place of business in the State of Rhode Island. Defendants Kaiser Engineers Division of Henry J. Kaiser Company (hereinafter "Kaiser"), Sergent, Hauskins & Beckwith (hereinafter "SH&B"), and Does 1 through 10, are citizens and residents of States other than Rhode Island and have their principal places of business in places other than the State of Rhode Island. The amount in controversy herein is in excess of $10,000.00. Jurisdiction exists under 28 U.S.C.A. § 1332.

2. Kaiser engineered and designed and SH&B provided the engineering services for the maintenance and surveillance of a certain tailings dam at the Churchrock, New Mexico facility of United Nuclear Corporation. In connection with said efforts each of them undertook to and did provide professional services and warranted and represented that the said professional services would be performed in accordance with appropriate professional standards. On July 16, 1979 the said dam failed causing substantial loss and damage to UNC.

3. Allendale and Appalachian had issued certain policies of insurance to UNC and UNC has made a claim against Allendale and Appalachian alleging that either or both of the said insurers are liable to UNC for indemnification under the said insurance contracts for the loss and damage suffered by UNC as the result of the said failure of the said tailings dam. Allendale and Appalachian deny liability to UNC for the said losses under the said contracts of insurance.

4. United Nuclear Corporation ("UNC") has made a claim against Allendale and Appalachian alleging that

either or both of the said insurers are liable to UNC for indemnification under certain insurance contracts for the loss and damage suffered by UNC as the result of the failure of a certain tailings dam at its Churchrock, New Mexico facility which failure occurred on July 16, 1979. Allendale and Appalachian deny liability to UNC for the said losses under the said contracts of insurance.

5. The lawsuit arising out of UNC's claim against Allendale and Appalachian came on for trial in the District Court of the County of Santa Fe, State of New Mexico, and on May 20, 1983 the Court therein issued certain findings of fact, conclusions of law and order for judgment and on May 27, 1983 certain judgments were entered. Post trial motions relating to the said judgments were denied. There is presently no way of knowing or determining whether Allendale, Appalachian or either of them will ultimately be obligated to pay to UNC all or any part of UNC's losses arising out of the failure of its dam.

6. Defendants herein (including the Does) are individuals and parties who on information and belief may be liable to UNC in contract or tort for the damages suffered by UNC as a result of the failure of the said dam. In the event Allendale or Appalachian are obligated to pay any monies to UNC arising under their said contracts of insurance they will become subrogated by contract and by operation of law to any claims UNC might have against defendants. If the parties hereto await the ultimate determinations of the New Mexico courts on the question of the liability of Allendale and Appalachian under their said insurance contracts, the statutes of limitation will or may have run barring plaintiffs' potential subrogated claims.

7. Accordingly, and to avoid the bar, plaintiffs herein allege on information and belief that defendants and each of them were negligent in the design and construction of the dam and acted in breach of their contractual and professional obligations in the maintenance and surveillance of the dam which negligence and breach of contract caused the losses complained of by UNC against plaintiffs herein and that the said defendants are liable to UNC for UNC's said loss.

WHEREFORE, plaintiffs herein seek a declaratory judgment as follows:

a. If and to the extent Allendale or Appalachian are found to be liable to UNC under their contracts of insurance for loss and damage arising out of the failure of the dam on July 16, 1979, Allendale and Appalachian will be subrogated to UNC's claims against defendants herein and will be entitled to judgment against defendants herein for the amount adjudged to be their contractual liabilities (if any) to UNC.

b. That defendants, and each of them, were negligent in the design and construction of the dam and acted in breach of their contractual and professional obligations in the maintenance and surveillance of the dam which negligence and breach of contract caused the losses complained of by UNC against plaintiffs herein and that the said defendants are liable to UNC for UNC's said loss.

c. If and to the extent Allendale or Appalachian are found to be liable to UNC under their contracts of insurance for loss and damage arising out of the failure of the dam on July 16, 1979, that Allendale and Appalachian will be subrogated to UNC's claims against defendants

herein and will be entitled to judgment against defendants herein for the amount adjudged to be their contractual liabilities (if any) to UNC.

d. For such other and further relief as may be appropriate. Plaintiffs demand trial by jury.

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APPENDIX E

UNITED STATES of America, Plaintiff,

v.

UNDETERMINED QUANTITIES OF AN ARTICLE OF DRUG "BIOTIN" and Undetermined Quantities of An Article of Drug "MiSiM" and 27 Fiber Drums, More or Less, of An Article of Drug "DiMethyl Sulfone," and Undetermined Quantites of Items of Written, Printed, or Graphic Matter Which Are Accompanying Labeling for the Articles of Drug "Biotin" and "MiSiM", Defendants.

Civ. A. No. 86-A-1823.

United States District Court, D. Colorado.
January 26, 1987.

Richard J. Nolan, Assistant U.S. Attorney, Denver, Colo., for plaintiff.

Robert E. Purcell, Englewood, Colo., for defendants.

MEMORANDUM OPINION AND ORDER

ARRAJ, District Judge.

INTRODUCTION

This case is before the court on plaintiff United States of America's motion to dismiss claimant's counterclaim. The parties have submitted briefs in support of their respective positions on this motion, and I have heard oral argument on the issues.

BACKGROUND

The claimant, John Ewing Company of LaSalle, Colorado, is in the business of selling animal foods and supplements. On September 2, 1986 the Food and Drug Admin-

istration (FDA) commenced this lawsuit as a seizure action alleging violations of the federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq. On September 5, 1986, the FDA seized from claimant large quantites of animal food supplements containing Biotin and Dimethyl Sulfone (MSM), as well as various brochures and promotional materials. The FDA alleges that the supplements are "unsafe" pursuant to 21 U.S.C. § 360b(a)(1)(A), since the FDA had not approved the uses for which they were being advertised by claimant.

After commencement of the lawsuit, claimant contacted the FDA's lead counsel in an effort to determine what specific statements and representations the FDA would not deem objectionable. This effort having proved fruitless, claimant filed an answer in the lawsuit, including a counterclaim for a declaratory judgment that 59 statements which claimant intends to use in marketing the supplements do not violate the federal Food, Drug and Cosmetic Act. Through discovery, claimant has learned that the FDA considers many, if not all, of these statements to be illegal. However, the FDA has not threatened claimant with further prosecution.

DISCUSSION

Pursuant to Rules 12(b)(1) and 12(b)(6), F.R.Civ.P., the plaintiff moves to dismiss claimant's counterclaim for lack of subject matter jurisdiction and for failure to state a claim under which relief can be granted. This court agrees with plaintiff's contentions, and for the reasons discussed below grants plaintiff's motion to dismiss.

In passing on a motion to dismiss on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the court must accept all material factual allegations contained in the complaint as true and construe the complaint in favor of the pleader. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Long Island Lighting Co. v. County of Suffolk, N.Y., 604 F. Supp. 759, 761 (E.D.N.Y. 1985).

Under the Declaratory Judgment Act a court of the United States may "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. The statute is procedural in nature, and does not attempt to change the essential requisites for the existence of jurisdiction. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 325, 56 S.Ct. 466, 80 L.Ed. 688 (1936); National Valve and Mfg. Co. v. Grimshaw, 181 F.2d 687, 689 (10th Cir. 1950). The purpose of the Declaratory Judgment Act is to settle actual controversies before they ripen into violations of law or a breach of duty. United States v. Fisher-Otis Company, Inc., 496 F.2d 1146, 1151 (10th Cir.1974).

The power of the federal courts is limited under Article III of the Constitution to appropriate cases and controversies. U.S. Constitution, art. III, § 2. It is fundamental that a United States District Court may not render advisory opinions. Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969); Preiser v. Newkirk, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975). Therefore, in order for the court to grant relief under the Declaratory Judgment Act, an "actual contro-

versy'' is required. Indeed, the express terms of the Act require that cases brought pursuant to it present an actual controversy, and not a mere abstract question. 28 U.S.C. § 2201; State of Utah v. Andrus, 636 F.2d 276, 278 (10th Cir.1980).

The test to be applied in determining the existence of an actual controversy in the context of a declaratory judgment action is stated in Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826, 829 (1941):

The difference between an abstract question and a ''controversy'' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all circumstances, show that there is a substantial controversy, between parties having adverse interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Accord, Golden v. Zwickler, supra; United States v. Fisher-Otis Company, Inc., supra; Blinder, Robinson & Co., Inc. v. United States Securities and Exchange Commission, 748 F.2d 1415, 1418 (10th Cir.1984), cert denied, 105 S.Ct. 2655 (1985); Allendale Mutual Insurance Co. v. Kaiser Engineers, Division of Henry J. Kaiser Co., 804 F.2d 592, 594 (10th Cir.1986).

Under this test, a controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than a speculative threat

of future injury. A case or controversy exists only where the dilemma of the claimant is present and not contingent on the happening of hypothetical future events. City of Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S.Ct. 1660, 1666, 75 L.Ed.2d 675 (1983); Emory v. Peeler, 756 F.2d 1547, 1552 (11th Cir.1985); Bruhn v. STP Corporation, 312 F. Supp. 903, 905 (D.Colo.1970). The determination whether a "controversy" is presented must of necessity be made on a case-by-case basis. Hendrix v. Poonai, 662 F.2d 719, 721 (11th Cir.1981).

In this case, claimant asks the court to declare that, if it markets animal supplements containing Biotin and MSM in the future, using any of the 59 statements listed in its counterclaim, and if the FDA then decides to bring an enforcement action against claimant, the claimant has not violated the federal Food, Drug, and Cosmetic Act.

While it is true that the actual enforcement of a statute or regulation against the claimant is no prerequisite to a declaratory judgment action to establish nonliability, Doe v. Bolton, 410 U.S. 179, 188, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), not everyone who fears that a government agency may seek to compel enforcement of a law may bring suit under the Declaratory Judgment Act. One's fears must be sufficiently real and immediate, based on the actions or representations of one's potential adversary or based on actions one desires to take which may run afoul of the law. D'Imperio v. United States, 575 F.Supp. 248, 251 (D.N.J. 1983). The mere possibility, or even probability that a person may be adversely affected in the future by the acts of a government agency does not create an "actual controversy" within the meaning of § 2201. Dawson v. Depart-

ment of Transportation, 480 F.Supp. 351, 352 (W.D.Okla. 1979). Rather, for such an action to present a justiciable controversy the threat of enforcement must have immediate coercive consequences of some sort upon the claimant. Lake Carriers' Association v. MacMullan, 406 U.S. 498, 508, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972); Rocky Mountain Oil and Gas Association v. Watt, 696 F.2d 734, 741 (10th Cir.1982); Nuclear Engineering Co. v. Scott, 660 F.2d 241, 252 (7th Cir.1981), cert. denied, 455 U.S. 993 (1982).

This court concludes that claimant's counterclaim does not present a live controversy, but rather an abstract question based upon the possibility of a factual situation that may never develop. Hendrix v. Poonai, supra. The act which would allegedly result in another FDA lawsuit—claimant's marketing of products containing Biotin and MSM—has not yet occurred. Although the FDA has advised claimant that they would consider such marketing illegal, they have not directly threatened claimant with prosecution if it did so. Therefore, neither party has taken steps or pursued a course of conduct which will necessarily lead to litigation in the immediate future, nor does it appear that there are any immediate coercive consequences visited upon the claimant. See Doe v. Dunbar, 320 F.Supp. 1297 (D.Colo.1970); Bruhn v. STP Corporation, supra.

Furthermore, the Declaratory Judgment Act should not be used to pre-empt issues that are committed for initial decision to an administrative body. Public Service Commission of Utah v. Wycoff, 344 U.S. 237, 246, 73 S.Ct. 236, 97 L.Ed. 291 (1952); Dawson v. Department of Transportation, supra. If the court were to grant the relief sought by

claimant in this action, it would effectively pre-empt the FDA from deciding whether the animal drugs in question should be deemed unsafe with respect to their particular or intended use, an issue committed to the plaintiff under 21 U.S.C. § 360b. Cf. American Cyanamid Co. v. Young, 770 F.2d 1213 (D.C.Cir.1985).

Accordingly, it is

ORDERED that plaintiff United States of America's motion to dismiss claimant's counterclaim is GRANTED.

Nos. 86-1598 & 86-1615

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KAISER ENGINEERS, DIVISION OF HENRY J. KAISER COMPANY, and AZL ENGINEERING, INC. (formerly SERGENT HAUSKINS & BECKWITH),
Petitioners,

v.

ALLENDALE MUTUAL INSURANCE COMPANY,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where an insurer has been adjudged liable to its insured, has appealed the judgment, and is in imminent danger of losing its subrogation rights through the running of a statute of limitations, does a dispute between the insurer and tortfeasors potentially liable to the insurer by way of subrogation constitute an "actual controversy" of sufficient immediacy and reality to support jurisdiction under the Declaratory Judgment Act and Article III, Section 2, of the Constitution?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 86-1598 & 86-1615

KAISER ENGINEERS, DIVISION OF HENRY J. KAISER COMPANY, and AZL ENGINEERING, INC. (formerly SERGENT HAUSKINS & BECKWITH),
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ALLENDALE MUTUAL INSURANCE COMPANY,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Allendale Mutual Insurance Company,[1] respectfully submits this brief in opposition to the peti-

[1] In compliance with Sup. Ct. R. 28.1, Allendale states that it has no parent companies and that all subsidiaries of Allendale are wholly-owned, except for the following affiliates: FM Insurance Company Limited, Factory Mutual Engineering Corporation, and Factory Mutual Service Corporation. Allendale is a partner in the Factory Mutual Engineering Association and the Factory Mutual Service Bureau.

tions for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit filed by Kaiser Engineers, Division of Henry J. Kaiser Company, and AZL Engineering, Inc. (formerly Sergent Hauskins & Beckwith). The decision of the Court of Appeals entered on November 6, 1986, is reported at 804 F.2d 592 (10th Cir. 1986), and is reprinted in Appendix A to each of the petitions.[2]

STATEMENT OF THE CASE

The losses from which this jurisdictional dispute arises occurred at a uranium mill owned and operated by Allendale's insured, United Nuclear Corporation ("UNC"). In July 1979, a uranium wastewater retention dam at UNC's mill collapsed, releasing large quantities of hazardous waste and interrupting UNC's milling operations. The retention dam had been designed and built by petitioners Kaiser Engineers and AZL Engineering ("Kaiser/AZL"). To recover its losses, UNC sued Allendale in a New Mexico state court, alleging it was entitled to reimbursement under a policy of business interruption and property damage insurance. The trial court resolved the coverage dispute in UNC's favor and awarded UNC $24,670,724 in compensatory damages and $25,000,000 in punitive damages. Judgment for these amounts was entered against Allendale on May 27, 1983, and Allendale appealed to the Supreme Court of New Mexico.[3]

In New Mexico property damage claims are subject to a four-year statute of limitations. N.M. Stat. Ann. § 37-1-4 (1978). Fearing that this statute might run and bar

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[2] In this brief, appendix citations will be to pages in the appendices to the AZL Engineering, Inc. petition and will be in this form: "AZL Pet. App. ——."

[3] On October 15, 1985, the New Mexico Supreme Court affirmed the award of compensatory damages and reversed the award of punitive damages. *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985).

assertion of subrogation claims against Kaiser/AZL in the event UNC's judgment were upheld on appeal, Allendale filed the present declaratory judgment action on July 15, 1983, in the United States District Court for the District of New Mexico. Allendale sought a declaration that UNC's losses were caused by Kaiser/AZL's negligence and that it was entitled to recover from them all sums which it might be required to pay UNC under the contract of insurance.

The District Court dismissed Allendale's complaint on the ground that, because Allendale had not yet paid the UNC judgment, it was not subrogated to UNC's right of action against Kaiser/AZL. The District Court concluded that an "actual controversy" did not exist under 28 U.S.C. § 2201, and that it lacked subject matter jurisdiction to entertain the action. AZL Pet. App. 8.

Allendale appealed from the dismissal of its complaint, and on November 6, 1986, the United States Court of Appeals for the Tenth Circuit reversed. The Court held that an "actual controversy" did exist between Allendale and Kaiser/AZL and remanded the case for further proceedings. AZL Pet. App. 1. Kaiser/AZL's petitions for rehearing were denied January 2, 1987. AZL Pet. App. 11.

The dispute in the District Court over the extent of Allendale's subrogation rights is now moot because the New Mexico Supreme Court affirmed UNC's judgment for compensatory damages and in December 1985 Allendale paid that judgment. Thus, Allendale is now fully subrogated to UNC's right of action against Kaizer/AZL. After remand to the District Court, Allendale amended its complaint asserting that it had paid the UNC judgment and seeking damages against Kaizer/AZL by way of subrogation. The present dispute over the District Court's jurisdiction at the time Allendale originally filed its declaratory judgment action would also be moot but for the possibility that the New Mexico statute of limitations

might bar Allendale from now filing a new action against petitioners.

REASONS WHY THE PETITIONS SHOULD BE DENIED

I. The Court of Appeals Correctly Applied *Maryland Casualty* to the Facts of This Case, and the Decision Below Does Not Pose a Federal Question of Substantial Importance.

The Court of Appeals applied this Court's holding in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941), to the facts of this case and correctly concluded that there was an actual controversy of sufficient immediacy and reality to support the District Court's jurisdiction under the Federal Declaratory Judgment Act.

In *Maryland Casualty*, this Court held that under the Declaratory Judgment Act, 28 U.S.C. § 2201 (Supp. III 1985), an "actual controversy" can exist between an insurer and a third party even though any obligation of the insurer to the third party is contingent upon the outcome of litigation pending in another court. The insurer in *Maryland Casualty* sought a declaration that it was not liable to a third party who had been involved in an automobile accident with its insured. The third party argued that an "actual controversy" did not exist because any liability of the insurer to the third party was contingent upon the outcome of pending litigation in a state court between the third party and the insured.

In rejecting this argument, this Court set forth the following test for determining whether an "actual controversy" exists:

> The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there

> is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

312 U.S. at 273.

The situation here is similar to that in *Maryland Casualty*. Here the insurer, Allendale, sought a declaration that third parties, Kaiser/AZL, would be liable to Allendale contingent upon the outcome of pending state-court litigation. Kaiser/AZL argue that an actual controversy did not exist at the time this action was filed because Allendale's right to recover from Kaiser/AZL was contingent upon affirmance of the state-court judgment. The only significant distinction between this case and *Maryland Casualty* is that *Maryland Casualty* involved an insurer's contingent *liability* to a third party, depending upon the outcome of other litigation, while this case involves an insurer's contingent *claim* against a third party, depending upon the outcome of other litigation. Declaratory relief is no less appropriate in asserting a contingent claim than in resisting a contingent liability.

Kaiser/AZL take the position that declaratory relief is inappropriate when future events, like reversal of the state-court judgment in this case, may extinguish a contingent claim for money damages. Petitioners plainly confuse the ultimate right of recovery, in this case money damages, with the right to obtain a declaration of the rights of the parties. Petitioners ignore the express language of 28 U.S.C. § 2201(a) that declaratory relief may be obtained "whether or not further relief is or could be sought."

Petitioners, particularly Kaiser Engineers, argue that, by permitting a declaration of Allendale's rights, the Tenth Circuit has created an entirely new type of action, which if allowed to stand will engulf the federal

courts in unnecessary litigation. On the contrary, the decision below establishes no new legal principles and gives rise to no new causes of action. Instead, the Tenth Circuit has carefully applied to the circumstances of this case the doctrine established over fifty years ago in *Maryland Casualty*. Petitioners ignore this Court's recognition in that case that a need for declaratory relief may exist even in the absence of a present right to recover damages.

Federal Courts have long exercised jurisdiction over contingent rights of recovery. For example, Fed. R. Civ. P. 14(a) provides that a defendant may implead a person "who is or may be liable to him for all or part of the plaintiff's claim against him." In particular, an insurer is entitled to implead a third-party tortfeasor who the insurer alleges will be liable to it for any sum the insurer is required to pay to its insured, even though the insurer's subrogation rights have not yet been perfected by payment to the insured. *Glens Falls Indem. Co. v. Atlantic Bldg. Corp.*, 199 F.2d 60, 63 (4th Cir. 1952). In light of this long-standing recognition of the authority of federal courts, petitioners cannot argue now that exercising jurisdiction over such contingent rights of recovery violates the "case or controversy" requirement of Article III of the Constitution.[4]

In determining whether an "actual controversy" exists under the Declaratory Judgment Act, a plaintiff's need for a declaration of his rights is of decisive importance. *Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426, 431 (1948). In *Maryland Casualty* the Court was concerned with the insurer's need to avoid possible conflicting interpretations of its insurance policy. In this

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[4] The "actual controversy" language in the Declaratory Judgment Act requires that a "case or controversy" exist under Article III of the Constitution. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937). AZL Engineering concedes this. AZL Pet. 7. Therefore, if an "actual controversy" exists as defined by this Court in *Maryland Casualty*, then a "case or controversy" also is present under Article III.

case the insurer's need is of even greater immediacy and reality. If Allendale were denied declaratory relief, its subrogation claims might be barred by New Mexico's four-year statute of limitations. Concern for the running of a statute of limitations has been held to be "the kind of interest that the Declaratory Judgment Act was intended to protect." *Fidelity & Deposit Co. of Maryland v. City of Sheboygan Falls*, 713 F.2d 1261, 1265 (7th Cir. 1983). Moreover, the state-court judgment against Allendale was not remote, hypothetical or abstract; in order to stay it pending appeal Allendale had to post a supersedeas bond guaranteeing payment if the judgment were upheld. At the time this action was filed Allendale was thus faced with a trial-court judgment of nearly $25 million in compensatory damages and with the imminent running of the statute of limitations. Allendale's need for a determination of its rights was both immediate and real.

Maryland Casualty declares that the parties to a declaratory judgment action should have "adverse legal interests." 312 U.S. at 273. As soon as the state trial court entered judgment against Allendale, Allendale acquired a direct subrogation interest in its insured's right of action against Kaiser/AZL. *Meredith v. The Ionian Trader*, 279 F.2d 471, 474 (2d Cir. 1960): "To obtain the benefits of the doctrine of subrogation one of the conditions which the insurer must fulfill is payment, or *sufferance of a judgment requiring payment*, of the obligation owed the insured." (emphasis added)

Kaiser erroneously argues that New Mexico law confers a subrogation interest only when an insurer makes payment to its insured. Kaiser Pet. 10. On the contrary, a contingent subrogation right arises in favor of an insurer once a loss occurs, even though payment has not been made. *March v. Mountain States Mut. Cas. Co.*, 101 N.M. 689, 691-92, 687 P.2d 1040, 1042-43 (1984): "Although the subrogation right is not fixed until a loss payment is made, a contingent subrogation right in favor of the insurer arises when the loss occurs." Petitioners

once again confuse the interest necessary to recover damages with the interest necessary to obtain a judgment declaring the rights of the parties. A suit for declaratory relief to determine the extent and consequences of Allendale's contingent subrogation right is entirely consistent with New Mexico law.

II. No Conflict Exists Among the Circuit Courts of Appeals.

In 1948 this Court issued a writ of certiorari in *Maryland Casualty* to resolve a conflict then existing among the circuits respecting whether a dispute between an insurer and a third party constituted an "actual controversy" under the Declaratory Judgment Act. This Court resolved that conflict by fashioning a test which the Tenth Circuit routinely applied to the facts of this case. Today, there is no conflict among the circuits on this issue, and petitioners cite no cases establishing one.

Maryland Casualty has been consistently cited and repeatedly followed by federal courts in upholding declaratory judgment jurisdiction in cases involving contingent rights and liabilities. *E.g., American Machine & Metals v. De Bothezat Impeller Co.*, 166 F.2d 535, 536 (2d Cir. 1948) (action to determine legal consequences if party should exercise right to terminate written agreement); *Franklin Life Ins. Co. v. Johnson*, 157 F.2d 653, 658 (10th Cir. 1946) (dispute between insurer and contingent third-party beneficiary under life insurance policy)[5]; *Spivey v. Travelers Ins. Co.*, 407 F. Supp. 916, 917

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[5] AZL Engineering attempts to portray a conflict *within* the Tenth Circuit. AZL Pet. 23-24. To the contrary, in *Franklin Life* the Tenth Circuit cited *Maryland Casualty* and held:

> To hold a person whose interest is contingent may not be compelled to defend an action for a declaratory judgment would greatly diminish the field and lessen the utility of declaratory judgment actions.

157 F.2d at 658. The decision below does not conflict with any other Tenth Circuit decision except perhaps *National Valve & Manufacturing Co. v. Grimshaw*, 181 F.2d 687 (10th Cir. 1950), which, to the extent of any conflict, was expressly disapproved. AZL Pet. App. 7.

(E.D.Pa. 1976) (declaratory relief allowed even though underlying judgment appealed and not yet affirmed); *Lumbermens Mut. Cas. Co. v. Borden Co.*, 241 F. Supp. 683, 701 (S.D.N.Y. 1965) (subrogation rights contingent upon future finding that certain releases were invalid).

Though not citing *Maryland Casualty*, other federal courts also have held that an actual controversy may exist so as to justify declaratory relief even when the actual right of recovery is contingent upon future events. *E.g., Seguros Tepeyac, S.A. Compania Mexicana v. Jernigan*, 410 F.2d 718, 728-29 (5th Cir.), *cert. denied*, 396 U.S. 905 (1969) (dispute over insurer's duty to reimburse insured for future payments insured might be required to make to judgment creditor); *West American Ins. Co. v. Allstate Ins. Co.*, 295 F.2d 513, 516 (10th Cir. 1961) (dispute between two insurance companies over primary liability for future damages insured might be required to pay); *Pennsylvania Cas. Co. v. Upchurch*, 139 F.2d 892, 893-94 (5th Cir. 1943) (dispute between insurer and third-party claimant against insured when liability of insured not yet established).

The authors of the major treatises on federal civil procedure also have interpreted this Court's decision in *Maryland Casualty* to recognize an insurer's need to determine liability even though future contingencies may extinguish the actual right of recovery. *See* 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 2757 at 586 (2d ed. 1983) ("It is clear that in some instances a declaratory judgment is proper even though there are future contingencies that will determine whether a controversy ever actually becomes real."); 6A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 57.19 at 57-203 (2d ed. 1986).

Kaiser Engineers incorrectly argues that the decision of the Seventh Circuit in *Fidelity & Deposit Co. of Maryland v. City of Sheboygan Falls*, 713 F.2d 1261 (7th Cir. 1983), conflicts with the decision below. Kaiser Pet. 6-9.

In fact, however, that decision *supports* the result reached by the Tenth Circuit. In *Fidelity* the Seventh Circuit granted declaratory relief to an insurer to determine its liability under a surety bond and its contingent claims against certain contractors whose work was insured by the bond. The Seventh Circuit *approved* the need for declaratory relief, noting that the passage of time might otherwise bar the insurer's claims. 713 F.2d at 1265.

The cases cited by Kaiser/AZL establish only that a controversy may be so remote that the issuance of declaratory relief is not warranted. Allendale does not dispute this obvious proposition. Under *Maryland Casualty*, whether an "actual controversy" exists requires a determination whether the facts alleged, under all the circumstances, establish a dispute of sufficient immediacy and reality to warrant declaratory relief. 312 U.S. at 273. Thus decisions in the circuit courts of appeals must be reviewed in light of the facts of each case. Petitioners cite no case, and Allendale is aware of none, in which a judgment has been entered against an insurer and the insurer has then been barred from seeking declaratory relief against one claimed to be liable to it merely because the outcome of an appeal from the judgment is still in doubt. Such a result would be in clear conflict with the principles articulated by this Court in *Maryland Casualty*.

III. The Decision Below Does Not Interfere with State Court Proceedings.

The petition filed by Kaiser Engineers maintains that the decision of the Court of Appeals constitutes an unwarranted intrusion into the affairs of the New Mexico court system and "overrides New Mexico state subrogation law. . . ." Kaiser Pet. 10. Kaiser relies upon *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), and *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942), where this Court held that maintaining a federal suit may be inappropriate when a pending state-court action presents the same issues.

The decision below does not present this Court with any such situation. The state-court litigation between Allendale and UNC concerned the existence of insurance coverage under a policy issued to UNC. The federal action for declaratory relief between Allendale and Kaiser/AZL concerns the negligence of Kaiser/AZL in designing and constructing the uranium wastewater retention dam. These issues are separate and unrelated.

Kaiser argues that Allendale should have litigated both issues in one state-court action.[6] Kaiser Pet. 8. Allendale does not deny that under N.M. R. Civ. P. 14 it could have impleaded Kaiser/AZL into the state-court dispute over insurance coverage, but that rule, like the analogous federal rule, provides that a defendant "may" implead a party who may be liable to him. As the decision below held, impleading third parties is not mandatory. AZL Pet. App. 7 n.2. *See Salazar v. Murphy*, 66 N.M. 25, 31, 340 P.2d 1075, 1079 (1959). *Cf.* 3 J. Moore, *Moore's Federal Practice* ¶ 14.06 at 14-38 (2d ed. 1985) ("Impleader is permissive and not compulsory."); 6 C. Wright & A. Miller, *Federal Practice & Procedure* § 1446 at 245 (1971) (Rule 14 "does not compel defendant to bring third parties into the litigation . . . ."). Because the issues involved in the state and federal actions were unrelated, and because of the size and complexity of the litigation, Allendale elected to file a separate action in federal court. No state-court claim concerning Kaiser/AZL's liability or responsibility for the loss was pending. Therefore, Allendale's choice of a federal forum does not conflict with this Court's holdings in *Brillhart* or *Colorado River Water Conservation District.*

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[6] This argument, of course, is inconsistent with Kaiser's principal contention in its petition—that there was no case or controversy to litigate. It is precisely *because* Allendale had a cause of action for contingent relief against Kaiser/AZL—because such a justiciable controversy existed—that Allendale was entitled to sue them in *either* federal court (assuming diversity) or state court. *See also* p. 6, *supra.*

The right to a federal forum for Allendale's claims against Kaiser/AZL is provided by 28 U.S.C. § 1332 (1982). *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943): "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts." One of the prime purposes of the Declaratory Judgment Act was to permit an insurer to establish liability. *Western Cas. & Sur. Co. v. Teel*, 391 F.2d 764, 766 (10th Cir. 1968). Federal jurisdiction may not be refused merely because a state remedy is available or because another suit, involving other issues, is pending in a state court. *Id.*

CONCLUSION

The Court of Appeals correctly concluded that, when a judgment has been entered against an insurer who is awaiting the outcome of an appeal from that judgment, and when in that process the insurer is confronted with the running of a statute of limitations and loss of its subrogation rights against a potentially liable third party, an actual controversy of sufficient immediacy and reality exists to support an action by the insurer for declaratory relief. For the foregoing reasons, Allendale respectfully requests that the petitions for a writ of certiorari be denied.

Respectfully submitted,

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No. 86-1615

In The
Supreme Court of the United States
October Term, 1986

AZL ENGINEERING, INC.
(formerly SERGENT HAUSKINS & BECKWITH),
Petitioner,

v.

ALLENDALE MUTUAL INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER AZL ENGINEERING, INC.

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REPLY[1]

Reply will be made to four aspects of "Respondent's Brief In Opposition": (1) the "real party in interest" rule; (2) *March v. Mountain States Mut. Cas. Co.*, 101 N.M. 689, 687 P.2d 1040 (1984); (3) *Meredith v. The Ionian Trader*, 279 F.2d 471 (2 Cir. 1960); (4) *Fidelity & Deposit Co. Of Maryland v. City Of Sheboygan Falls*, 713 F.2d 1261 (7 Cir. 1983).

1. The "Real Party In Interest" Rule

In its Petition, AZL Engineering, Inc. (AZL)[2] strenuously argued under Point II (AZL Petition, 19-23) that respondent Allendale Mutual Insurance Company (Allendale) was not the "real party in interest" under F.R.C.P. 17(a) and, therefore, was precluded from bringing suit as F.R.C.P. 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest. * * *" Further, in its "Conclusion" (AZL Petition, 28-30), AZL suggested a summary reversal of the 10th Circuit "on the basis of F.R.C.P. 17(a)'s 'real party in interest' rule alone". (AZL Petition, 28)

Significantly, Allendale's "Brief In Opposition" is devoid of any response to this argument. F.R.C.P. 17(a) and the "real party in interest" rule are not even mentioned. Petitioner, therefore, again respectfully requests a summary reversal of the 10th Circuit "on the basis of

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[1] Pursuant to Supreme Court Rule 28.1, the Court is advised that there is no change in the "List Of Parties" contained in AZL's Petition.

[2] Formerly Sergent Hauskins & Beckwith

F.R.C.P.'s 'real party in interest' rule alone". (AZL Petition, 28)[3]

2. March v. Mountain States Mut. Cas. Co.

The 10th Circuit did not rely on *March*. Nevertheless, Allendale now cites *March* for the proposition that a contingent subrogation right in favor of an insurer arises when a loss occurs even though payment has not been made. (Brief In Opposition, 7)[4] This argument does not go far enough. Mere possession of an inchoate right does not make one a "real party in interest" under F.R.C.P. 17(a). As the "real party in interest" rule focuses on the "party who, by the substantive law, possesses the right sought to be enforced" (AZL Petition, 20), citation to *March* does not solve Allendale's dilemma. In the instant situation, United Nuclear Corporation, (UNC) as the injured party, was the "real party in interest," not Allendale.

Nor does the mere possession of an inchoate right create a "case or controversy" or an "actual controversy". In addition to mere possession, there must also,

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[3] F.R.C.P. 17(a) and the "real party in interest" rule were argued in AZL's (then Sergent Hauskins & Beckwith's) "Answer Brief Of Appellee/Defendant Sergent, Hauskins & Beckwith" filed in the 10th Circuit and its "Brief In Support Of Motion To Dismiss" filed in the District Court. As Allendale takes no position to the contrary, AZL will not clutter the present record by attaching copies of those documents to this "Reply Brief".

[4] It seems somewhat ironic that Allendale would rely on a case wherein the policy provision provided that:

> * * * *upon payment* . . . , the policy required that Mountain States be subrogated to the rights of March against any parties who possibly would be liable * * * (emphasis added) 101 N.M. at p. 690

among other things, be a "controversy." See, e.g., *International Longshoreman's And Ware. U. v. Boyd*, 347 U.S. 222, 74 S.Ct. 447, 98 L.Ed. 650 (1954); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937); AZL Petition, 14-17.

Further, Allendale ignores the context of *March*. It was a coverage dispute between insurer and insured as are most of Allendale's cited cases. Insured was suing insurer over the extent of coverage. If analogous to anything, *March* is analogous to the coverage dispute evidenced by UNC's suit against Allendale, *United Nuclear Corp. v. Allendale Mut. Ins.*, 103 N.M. 480, 709 P.2d 649 (1985). Unlike *March*, the instant suit is plainly not one between insured and insurer over the extent of coverage.

Indeed, AZL submits that *March* is nothing more than the proverbial "red herring". A thorough reading of it shows that it provides no lessons applicable to the issues in the instant suit.

3. Meredith v. The Ionian Trader

Allendale cites *Meredith v. The Ionian Trader* for the proposition that "[t]o obtain the benefits of the doctrine of subrogation one of the conditions which the insurer must fulfill is payment, or sufferance of a judgment requiring payment, of the obligation owed the insured". (Brief In Opposition, 7) Assuming this to be a correct statement of the law, it, of course, ignores the meaning of "suffer". As basic a source as *Black's Law Dictionary*, 5th Ed. (1979) (hereinafter, *Black's*) defines "suffer" as follows:

> To allow, to admit, or to permit. (citation omitted) It includes knowledge of what is to be done under sufferance. (citation omitted). To suffer an act to be done or a condition to exist is to permit or consent to it; to approve of it, and not to hinder it. It implies knowledge, a willingness of the mind and responsible control or ability to prevent. *Wilson v. Nelson*, 183 U.S. 191, 22 S.Ct. 74, 46 L.Ed. 147 [(1901)].

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In *Miner v. Atlass*, 363 U.S. 641, 649, 80 S.Ct. 1300, 1305, 4 L.Ed.2d 1462, 1468 (1960), this Court recognized that the term "suffer a judgment" carried the connotations discussed in *Black's*, citing *Galveston Dry Dock Const. Co. v. Standard Dredg. Co.*, 49 F.2d 442 (2 Cir. 1930). Likewise, in *Wilson v. Nelson*, supra, this Court stated that one who executed a promissory note with an irrevocable power of attorney authorizing the confession of judgment and who subsequently had such a judgment entered against him " 'suffered or permitted' a judgment to be entered against him, ..." 183 U.S. at p. 198, 22 S.Ct. at p. 77, 46 L.Ed. at p. 151. See also, *Mayberry v. Maroney*, 558 F.2d 1159, 1164 (3 Cir. 1977); *Wilkey v. Wax*, 225 N.E. 2d 813 (Ill.App. 1967); *State v. Whitt*, 210 N.E.2d 279 (Ohio App. 1964).

A "judgment suffered" differs by leaps and bounds from a judgment obtained in an action vigorously contested on the merits. See, e.g., *Greiss v. Scarborough Estates, Inc.*, 14 N.Y.2d 39, 197 N.E.2d 530 (N.Y. 1964). Certainly, Allendale vigorously contested its obligation to pay UNC through denial of coverage, through trial and through appeal to the Supreme Court of New Mexico. As Allendale concedes, it finally paid UNC "in December 1985"

(Brief In Opposition, 3) for an incident which occurred "[i]n July 1979". (Brief In Opposition, 2) Most certainly, Allendale did not "suffer" a judgment. It fought tooth and nail against one.

Allendale cites *Meredith* without elaboration. There is no discussion of what "suffer a judgment" actually means. The reason for this omission is obvious. AZL needs say no more.

4. Fidelity & Deposit Co. Of Maryland v. City of Sheboygan Falls.

In its separate "Petition For Writ Of Certiorari" in no. 86-1598, Kaiser Engineers has addressed the problems with the 10th Circuit's reliance on the *Fidelity & Deposit Co. Of Maryland* case (*Fidelity*). AZL will add only a few comments in light of the arguments presented in the "Brief In Opposition".

It seems apparent that Allendale has either overlooked or ignored the factual situation in *Fidelity*. In *Fidelity*, a contractor executed a performance bond with two towns with respect to an incinerator it had agreed to build. Fidelity was the surety on the bond. When the incinerator did not measure up, the towns made demand upon Fidelity under the bond. The *Fidelity* opinion explicitly notes that "they notified Fidelity that it must make good the difference in accordance with the bond". 713 F.2d at p. 1265. Fidelity disagreed with the towns and brought a declaratory judgment action. A number of observations crucial to the maintenance of a declaratory

judgment action flow from the foregoing recitation of facts.

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 61 S.Ct. 570, 85 L.Ed. 826 (1940), requires: (1) a substantial controversy; (2) between parties having adverse legal interests; (3) of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. (AZL Petition, 14-15). In *Fidelity*, the towns had made a demand on Fidelity. Fidelity disagreed. An obvious controversy existed. In contrast, Allendale made no demand on AZL or Kaiser. Allendale simply filed suit contrary to *Aetna Life Ins. Co. v. Haworth*, supra. (See, AZL Petition, 11) Thus, in *Fidelity*, the first prong of the *Maryland Casualty Co.* test was satisfied. In the instant suit, is was not.

In *Fidelity*, Fidelity was the surety on a performance bond executed between a contractor and two towns. It thus became legally obligated to the towns in the event of the contractor's failure to adequately perform. Clearly, legal interests existed between Fidelity and the towns which, in the course of events, became adverse. In contrast, Allendale had no legally assertable interests as against AZL (or Kaiser) at the time it filed suit. (See, AZL Petition, 15-16) Allendale concedes that it did not pay UNC until December 1985. (Brief In Opposition, 3) Thus, in *Fidelity*, the second prong of the *Maryland Casualty Co.* test was satisfied. In the instant suit it was not.

As to the third prong of the *Maryland Casualty Co.* test, AZL simply notes its previous extensive discussion thereon. (AZL Petition, 16-19) AZL also briefly notes that the quotation from *Fidelity* at p. 7 of the "Brief In

Opposition'' is taken out of context as simply reading the *Fidelity* opinion will demonstrate.

The *Fidelity* case supports neither the 10th Circuit nor Allendale.

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CONCLUSION

Petitioner AZL submits that respondent Allendale's arguments in its ''Brief In Opposition'' do not rebut the arguments of AZL and Kaiser in their respective petitions. Most telling is Allendale's failure to even respond to AZL's ''real party in interest'' argument. It would seem patently obvious that until Allendale satisfied its obligation to UNC and made UNC whole in December of 1985, the ''substantive right sought to be enforced'' belonged to UNC. (AZL Petition, 19-23). *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 70 S.Ct. 207, 94 L.Ed. 17, 12 A.L.R.2d 444 (1949). That being the case, the 10th Circuit must be reversed on that point alone and the District Court must be affirmed

Respectfully submitted,

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